STATE OF MICHIGAN

IN THE SUPREME COURT

KRISTINE COWLES, an individual, on behalf of herself and all others similarly situated,

Plaintiffs/Appellees,

v.

BANK WEST, a State savings bank, f/k/a Bank West, F.S.B.,

Defendant/Appellant,

and

KAREN B. PAXSON, an individual, on behalf of herself and all others similarly situated,

Plaintiff-Intervenor/Appellee,

v

BANK WEST, a state savings bank, f/k/a Bank West, F.S.B.,

Defendant/Appellant.

Supreme Court Case No. 127564

Court of Appeals Case No. 229516

Kent County Circuit Court
Lower Court Case No. 98-06859-CP

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BRIEF OF PLAINTIFF-APPELLEE KAREN PAXSON

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COUNTERSTATEMENT OF ISSUES PRESENTED

1. Should Michigan class action law follow the language of the Michigan Court Rules as well as well-settled federal law interpreting the federal class action rule that class action statute of limitations tolling relates back to the original claim?

The trial court answered "no."

The Court of Appeals answered "yes."

Appellee answers "yes."

2. Can a "document preparation fee" of $200 be *bona fide* with the meaning of the Truth in Lending Act if it is not assessed for the preparation of documents?

The Trial Court answered "yes."

The Court of Appeals answered "no."

Appellee answers "no."

INTRODUCTION

Bank West's brief persists in mischaracterizing both the facts supporting Plaintiffs' claims and the nature and effect of a Court of Appeals opinion that applies the plain language of the Michigan Court Rules and the federal Truth in Lending Act.

With regard to tolling, the result endorsed by the Court of Appeals flows directly from the text of both the class action court rule (MCR 3.501(F)) and the rule on "relation back" of pleading amendments (MCR 2.118(D)). It properly recognizes the class action vehicle as a truly representative action in which all putative class members are joined from origination of the suit, and no more "hyperextends" limitations periods than the relation back doctrine itself. Bank West's suggestion that the Court of Appeals' decision conflicts with that of other jurisdictions is not only irrelevant but wrong.

Further, Bank West's effort to re-cast the majority's careful application of the Truth in Lending statute and regulations for defining undefined terms as a "subjective belief test" is revisionist. Indeed, as Bank West itself acknowledges, the Sixth Circuit has already embraced the reasoning of the majority opinion in Inge v. Rock Financial Corp., 388 F3d 930 (6th Cir. 2004). Moreover, Bank West's treatment of the facts giving rise to the Truth in Lending claim is incomplete and does not credit the supporting record that the Court of Appeals' opinion only summarizes.

THE NATURE OF PLAINTIFFS' CLAIM

Inasmuch as Bank West's entire Brief persists in mischaracterizing Plaintiffs' Truth in Lending claim throughout, we begin by explaining the nature of the claim and the facts supporting it. The case is not about whether the $250 "document preparation" fee was disclosed on one line of a disclosure form or another, but about whether it was disclosed in the Truth in Lending disclosure **as a finance charge**. The accurate disclosure of the **finance charge** lies at the heart of the Truth in Lending Act.

A. The Truth in Lending Act.

The Truth in Lending Act was enacted "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a); see Mourning v. Family Publications Service, Inc., 411 U. S. 356, 363-368 (1973); Beach v. Ocwen Federal Bank, 523 U. S. 410, 412 (1998). The Sixth Circuit has joined each circuit in repeatedly and consistently stating that the TILA is a remedial statute and, therefore, should be given a broad, liberal construction in favor of the consumer. *See* Pfennig v. Household Credit Services, Inc., 286 F. 3d 340, 344 (6th Cir. 2002); Inge v. Rock Financial Corporation, 281 F. 3d 613, 621 (6th Cir. 2002); Begala v. PNC Bank, 163 F. 3d 948, 950 (6th Cir. 1999); Jones v. TransOhio Sav. Ass'n, 747 F. 2d 1037, 1040 (6th Cir. 1984); Murphy v. Household Finance Corporation, 560 F. 2d 206, 210 (6th Cir. 1977).

"The scheme of TILA is to create a system of private attorney generals to aid its enforcement." Jones, 747 F. 2d at 1040. Once a court finds a violation of the TILA, no matter how technical, the court has no discretion as to the imposition of liability. *See* Purtle v. Eldridge Auto Sales, 91 F. 3d 797, 801 (6th Cir. 1996) *cert. denied,* 502 U. S. 1252 (1997).

The heart of the Truth in Lending Act, 15 U.S.C. § 1601 *et. seq.* is its rejection of the doctrine of *caveat emptor* in the realm of consumer credit:

> The Truth in Lending Act reflects a transition in congressional policy from a philosophy of "Let the buyer beware" to one of "Let the seller disclose."

Mourning v. Family Publications Serv., 411 U. S. 356, 377 (1973).

Under 15 U.S.C. §1605(a), the finance charge is "the sum of all charges payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." Exempted from this categorization are only those *limited* fees specifically excepted "as otherwise provided in this section." 15 U.S.C. § 1605(a). **"Loan fees" by lenders are finance charges.** 15 U.S.C. § 1605(a)(3).

Virtually all the fees ***exempted*** from the finance charge are those charged by third parties for services such as credit insurance, title insurance, recording, appraisal and such. See generally 15 U.S.C. §1605(b) through (e). The reason for this is manifest in the Congressional Record. As the original bill's chief sponsor, Sen. Paul Douglas, noted, the Act was designed to thwart the strategy of consumer lenders who:

> . . . Compound the camouflaging of credit by loading on all sorts of extraneous fees, such as exorbitant fees for credit life insurance, excessive

> fees for credit investigation, and all sorts of **loan processing fees** which rightfully should be included in the percentage rate statement so that any percentage rate quoted is completely meaningless and deceptive. [emphasis added]

109 Con. Rec. 2027 (1963) (remarks of Sen. Douglas). *See also* H.R. Rep. No. 1040, 90th Cong. 2d. Sess., *reprinted in* 1968 U.S.C.C.A.N. 1962, 1970. See also comments of Senator Sarbanes in connection with the 1995 amendment's tolerance provisions, Congressional Record, September 28, 1995, §14567.

There is an exceptionally small universe of fees which may be imposed by the lender **and** excluded from the finance charge, and these are treated in Regulation Z, 12 C.F.R. § 226.4(c)(7), where they are subject to the requirement that they be both "bona fide" and "reasonable in amount." The reason for imposing this restriction is obvious--it is important that lenders not be permitted to eviscerate the Act by relabeling their own fees ("loan fees" aka processing fees) as an excludable fee, and thus camouflage and exclude them from the finance charge. See Official Staff Commentary on Regulation Z, comment on 12 C.F.R. § 226.4(c)(7).

B. <u>Bank West's Processing Fee.</u>

Bank West concedes that it did not disclose the $250 "document preparation" fee as a finance charge. Thus, Bank West has violated the Act unless it can establish entitlement to an exclusion under 15 USC § 1605(e). This exclusion is not available unless Bank West can establish that the fee is both "bona fide" and "reasonable in amount." 12 CFR § 226.4(c)(7). Both the trial court and the Court of Appeals concluded Bank West failed the "bona fide" test. Here is the record on which they did so:

When Bank West's President and CEO Paul Sydloski arrived at the Bank in January of 1992, the Bank charged no fees. Sydloski Dep, p. 28, lines 18-21, Appellee's Appendix, p. 2b. Sydloski charged bank employee James Koessel with "recommending a fee to be charged, along with, **for the handling of the loan from the time of the application to the time of closing.**" Id., p. 29, lines 15-17, Appellee's Appendix, p. 3b.

Koessel returned with a recommendation that the Bank charge an "application fee," and on September 24, 1992, released a memo announcing "a $100 application fee to all applicants, effective immediately," and instructing how to disclose it.[1] Memo, Appellee's Appendix, p. 12b, ¶ 4. On the attached exemplary "Good Faith Estimate," the $100 "application fee" is crossed out, and in its place the $100 fee is relabeled "document preparation" fee. Memo, p. 3, Appellee's Appendix, p. 14b.

Mr. Sydloski spoke candidly about the rationale behind the $100 fee; a rationale linked to activities well beyond document preparation:

> A. I approved his recommendation to start charging $100. I don't recall whether it was ever discussed as to what the label of that was going to be.
>
> Q. Do you recall the rationale that Mr. Koessel offered to you for charging $100 for document preparation?
>
> A. The rationale, yes.
>
> Q. What was it? I realize this discussion was some nine years ago. Do you recall what he told you.

[1] An "application fee" is a finance charge under 15 USC § 1605(a) because it is not a fee subject to exclusion under § 1605(e).

MR. WALSH: Object to the form of the question. I think this was September of 1992.

MR. ANDING: I'm sorry, seven years ago. My math is a little off this morning.

A. Obviously, I can't recall exactly what happened. As I explained earlier, West Side Federal [former name of Bank West] did everything in-house with all of their loans, that is with the people that they had.

When I hired Mr. Koessel, it was the idea of growing the bank. Part of growing the bank involved growing his department, which was the lending department.

When you add more people and more services, there is more expense. I can't recall the exact analogy that my mind went through except to say that **we needed to charge some fees because we had taken on all this additional expense and for the cost of each loan going through had increased. That was the rationale.**

BY MR. ANDING:

Q. So you were looking at a fee to defer the costs of processing and approving mortgage loans, essentially?

A. The entire--to use the same term, the entire, to use the same term, process, included the underwriting, the servicing, not the servicing, **the underwriting, the processing, the closing, the whole gamut of jobs that are done by the financial institution to get the loan to be ready to close.**

Q. All right. So, as you recall the discussion with Mr. Koessel, it was a recommendation to charge a fee, you don't remember how the fee was to be coined or what it was to be called; is that right?

A. Correct.

Q. You know, however, that the objective was essentially to generate revenue that would defer the costs of processing and approving and making loans; is that right:[2]

---

[2] A "processing fee" is a classic finance charge directly forbidden by 15 USC § 1605(a)(3), nowhere in the catalog of non-finance charges in § 1605(e).

A. **Part of the costs, correct.**

(Sydloski Dep, pp. 31-33, Appellee's Appendix, pp. 4b-6b)

The fee once implemented was summarily raised to $200, then to $250. *See* memos at Appellee's Appendix, p. 15b and 16b.

The specific testimony the Court of Appeals cites simply summarizes the story told above:

> Q. Do you know specifically what the document preparation fee was to cover?
>
> A. In my opinion, it was to cover the defrayment of the cost associated with taking a loan through the entire sequence from the application through the closing and then either to sell it into the secondary market or to put it on the shelf.
>
> Q. When you say in your opinion, does that mean that you never established that as the bank's position as to what the document preparation fee was to cover, that's just your personal opinion?
>
> MR. WALSH: Object to the form of the question.
>
> A. I believe it's the opinion of the bank that the charges are to defray the expenses. That's my personal opinion now, that it's consistent.
>
> Q. (By Mr. Anding) Who within the bank that you were aware of held that view?
>
> A. I believe the senior management people would have held that view.
>
> Q: Was that the rationale for implementing a document preparation fee in 1992?
>
> MR. WALSH: Object to the form of the question.
>
> A. I believe I answered that quite some time ago, that there was an increase in products and services, et cetera; therefore, there was--it went from no fees to fees.

Q. **(By Mr. Anding) So is it your testimony that from the outset the document preparation fee was assessed by the bank against the borrowers to defray the costs associated with taking the loan through the entire sequence from the application through the closing?**

A. **The only things that I would exclude from that would be the costs associated with the loan origination and those costs that would be charged by the third parties, including the title company.**

Q. Let's get back to my question. I'm looking at your answer to my question a few moments ago: Was the rationale for imposing the document preparation fee from 1992 to December 30th, 1998, based upon the bank's intent to defray the costs associated with taking the loan through the entire sequence from the application through the closing?

A. I believe so.

Q. **That would include processing, underwriting and approval; is that correct?**

A. **Yes.**

(Sydloski Dep, pp. 123-125, Appellee's Appendix, pp. 7b-9b)

Following the filing of this lawsuit, the Bank quickly renamed the fee:

Q. Effective January 4, 1999, the policy of the bank was changed such that it discontinued charging a document preparation fee of $250, is that correct?

A: That is correct.

Q: It began charging a loan processing fee of $275; is that correct?

A: Yes.

* * *

Q: **And in addition, under the new policy the loan processing fee is now being included in the APR calculation; is that right?**

MR. WALSH: Object to the form.

A: Yes.

(Sydloski Dep, pp. 136 and 138, Appellee's Appendix, pp. 10b and 11b)

In simplest terms, the APR is calculated by taking the fees included in the "finance charge" and dividing it by the "amount financed." Thus, Mr. Sydloski is acknowledging that the "loan processing fee" was post-litigation (aka document preparation fee) properly being included in the "finance charge." Chief Lending Officer Koessel elaborates:

Q: And really my question is, did the [now] $275 loan processing fee cover the $250 document preparation fee that you discontinued?

MR. WALSH: Object to the form of the question.

A: It replaced it.

(Koessel Dep., 04/01/99, p. 58, Appellee's Appendix, p. 23b)[3]

ANALYSIS

A. The Court of Appeals Construed "Bona Fide" as the Truth in Lending Act Requires.

Although Bank West attempts to superimpose the title "subjective belief test" on the majority's analysis of the phrase "bona fide," the effort is unfair. The Court of Appeals adopted precisely the test for defining undefined terms that Regulation Z provides:

[3] While little turns on it, it must be pointed out that the "cost analysis" discussed in the Bank's Brief was performed not as a justification for the fee in the relevant timeframe, but after litigation commenced, as an after-the-fact effort to justify the fee it had originally named an "application fee" and charged for some seven years.

> The term "bona fide," as used in regulation Z, is not defined. 12 C.F.R. § 226.2(b)(3) provides that, unless a term is specifically defined in Regulation Z, "the words used have the meanings given to them by state law or contract." We construe undefined words used in statutes according to their plain and ordinary meanings. Cox v. Flint Bd. of Hosp. Mgrs., 467 Mich. 1, 18, 651 N.W.2d 356 (2002). Resort to dictionary definitions is acceptable and useful in determining ordinary meaning. *Id.* The term "bona fide" means made or done in good faith, without deception or fraud, authentic, genuine, real. *Random House Webster's College Dictionary* (1997). The purpose of TILA is to assure a meaningful disclosure of credit terms so consumers may compare various credit terms to allow them to avoid uninformed uses of credit. 15 U.S.C. § 1601(a); Inge v. Rock Financial Corp., 281 F.3d 613, 619 (C.A. 6, 2002). With that purpose in mind, and using the ordinary definition of "bona fide," a document preparation fee is not bona fide, authentic, or genuine, if it includes charges for items other than document preparation.

Cowles, 687 N.W.2d at 614.

Although the Court of Appeals' analysis has already been quoted with favor by the Sixth Circuit in Inge v. Rock Financial, 388 F3d 930 (2004), Bank West urges this Court to review this case to determine whether the Sixth Circuit should instead follow the decision of the Seventh Circuit in Guise v. BWM Mortgage, LLC, 377 F3d 795 (7th Cir 2004).[4] In essence, Bank West asks this Court to resolve a conflict between the Sixth and Seventh Circuits. Applicant's Brief at p. 20. Needless to say, resolving conflicts between the circuits is the purview of the United States Supreme Court, not the Michigan Supreme Court. Moreover, when this Court has been faced with resolving conflicts between the circuits, it has selected the law of the Sixth Circuit, in which Michigan sits:

[4] Although Guise was decided prior to Inge, the Sixth Circuit declined to cite or follow Guise, and instead cited Cowles with favor.

> We choose to follow the holding of the Sixth Circuit Court of Appeals which is the circuit most familiar with Michigan law.

Schueler v. Weintrob, 360 Mich 621, 634; 105 NW2d 42 (1960).[5]

The Cowles majority correctly identified and applied the test for determining the meaning of the word "bona fide," and the Sixth Circuit has cited Cowles with favor. There is no principled basis for this Court to upset a settled question of federal law, much less one that has already been resolved by the circuit in which the Court sits.

i. The Court of Appeals Did Not Endorse a "Subjective Belief Test"

Bank West's suggestion that the Cowles majority embraced a "subjective belief test" is an unjustified exercise in creative labeling. As the above record reflects, Bank West set out to charge a "fee for handling the loan" and originally labeled it an "application fee." The Bank's senior executive testified unambiguously that the fee was to "defray the costs associated with taking the loan through the entire sequence from the application through the closing." Finally, immediately upon Plaintiffs' filing suit, Bank West again relabeled the fee a "processing fee" and began disclosing it as part of the APR.

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[5] Furthermore, the Bank overstates the holding in Guise, which ultimately concludes no more than that the plaintiff there failed to come forward with evidence that a fee was **not** bona fide. In this same vein, Janes v. First Federal Savings & Loan Assn., 57 Ill 2d 398; 312 NE2d 605 (Ill 1974), cited by Bank West as supporting its position, actually supports the Cowles result by focusing on whether the fee is actually for the identified service:

> The question of bona fide is obviously closely related to the question whether the discounts were properly retained **as compensation for services actually performed**.

Janes at 613.

In short, the Bank set out to charge a processing fee and established a processing fee, but once it was established, it changed the name. The Bank's current notion that it only "subjectively believed" that it was making a loan fee, accidentally charging something else entirely, is the worst kind of relativism. The fee was not assessed for the service described, hence it was not bona fide.

B. The Court of Appeals Properly Construed the Plain Language of the Michigan Court Rules to Resolve the Tolling Question.

While Bank West pronounces Cowles a "monumental change" in class action tolling rules, the view Bank West espouses is based upon a monumental misconception: that unnamed class members are not parties to a pending class action proceeding. As the majority opinion in Cowles ably points out (in fn. 2), the United States Supreme Court has held that *unnamed class members are parties to* the action for procedural purposes including tolling statutes of limitation and appealing final orders. Devlin v. Scardelletti, 536 US 1, 9-11 (2002). *See also*, Sosna v. Iowa, 419 US 393, 399 (1975). This is in full accord with Michigan law. Warren Consolidated Schools v. WR Grace & Co., 205 Mich App 580, 585; 518 NW2d 508 (1994); Pressley v. Wayne Co. Sheriff, 30 Mich App 300, 318 (1971).

Contrary to Bank West's shrill objections it is widely recognized that an unnamed class member may, and even must, stand in for the original named class representative when a defect in the original representative's representation is discovered. *See*, e.g., Birmingham Steel v. TVA, 353 F3d 1331 (11th Cir 2003) [Error to decertify class when class representative is no longer a class member without permitting another member to represent class]; Lynch v. Baxley, 651 F2d 387 (5th Cir

1981) [error to dismiss class claim when representative is determined not to have standing without permitting a substitute class representative]; Dameron v. Sinai Hospital of Baltimore, Inc., 626 FSupp 1012 (D Maryland 1986) [Appropriate to substitute class representative when original representative's claim is found to be time-barred]; Alessandro v. State Farm Mut Auto Ins. Assn., 259 Pa Super 571; 393 A.2d 973 (Pa. 1977) reversed on other grounds, 487 Pa 274; 409 A.2d 347 (1979) [When class representative is found not to hold claim, class must be notified so that an alternate class representative can come forward to represent class]; Haas v. Pittsburgh National Bank, 526 F2d 1083, 1095-98 (3rd Cir 1975) [Proper to substitute class representatives when it appears that original representative's claim is time-barred; statute of limitations is tolled as to absent class members]. McKowan Lowe & Co. v. Jasmine Ltd., 295 F2d 380, 384-388 (3rd Cir 2002) [statute is tolled even though it is discovered that original class representative's claim was time-barred, and a new representative will be allowed to substitute].

Although Bank West suggests the Court of Appeals' decision in Cowles "conflict[s] with numerous federal courts," the claim will not stand up to a reading of the cases it goes on to cite. Most glaring here is Bank West's discussion of Crown Cork & Seal Co. v. Parker, 462 US 345 (1983), in which Bank West quotes not from the majority opinion but from the concurring opinion of Justice Powell.[6] As the Cowles opinion ably recognizes, the majority opinion in Crown Cork supports tolling as applied by the Court of Appeals here, and even Justice Powell in his concurring opinion

[6] Likewise, the language cited from American Pipe & Construction Co. v. Utah, 414 US 538 (1974) comes not from the majority opinion of the Court, but from a concurring opinion.

agreed that the statute of limitations is tolled as to all *unnamed class members* during the period class certification is pending or is in place.

For the first time in its current Brief to this Court, Bank West attempts to sidestep the fact that American Pipe and Crown Cork & Seal unambiguously and completely support Paxson's position by citing Johnson v. Railway Express Agency, Inc., 421 US 454 (1975), which held that filing an administrative claim with the EEOC did not toll the statute of limitations for a judicial claim under the Civil Rights Act.

While the Johnson petitioner, for reasons that are not entirely clear, attempted to rely upon American Pipe and Crown Cork, the Supreme Court noted a rather complete lack of nexus between these cases and the petitioner's case, only part of which was that the Crown Cork and American Pipe plaintiffs sought (as Paxson did) to advance a cause the original class representative could not, as opposed to a different claim the representative never sought to assert. *See* Johnson at 467. Quixotically, Bank West claims this distinction is the Court's "clarification" of the class action tolling rule. Bank West Brief at p. 13. Putting aside the fact that class action tolling issues were not even before the Johnson court, the alleged "distinction" does not avail Bank West, as Cowles asserted the same class claim as Paxson until Cowles' claim was determined to be time-barred. *See* Second Amended Complaint, Count VIII, Appellant's Appendix, p. 69a.

The other cases the Bank cites are also easily distinguished. Robbin v. Fluor Corp., 835 F2d 213 (9th Cir 1987); Korwek v. Hunt, 827 F2d 874 (2nd Cir 1987); Andrews v. Orr, 851 F2d 146 (6th Cir 1988); Salazar Calderon v. Presidio Valley Farmers Ass'n, 765 F2d 1334 (5th Cir 1985); In Re Elscint Securities Litigation, 674 FSupp 374 (D Mass 1987);

Fleming v. Bank of Boston Corp., 127 FRD 30, 36 (D Mass 1989); Fleck v. Cablevision VII, Inc., 807 FSupp 824 (DDC 1992) **all** address a situation where class certification was initially **denied**, then reasserted through a different class representative, and thus involved **relitigating** the propriety of class certification. That is not the situation here: The trial court certified the class and it remained certified throughout the period salient to the present analysis.

The several other cases Bank West cites are also easily distinguished. In Re Colonial Ltd. P'Ship Litig, 854 FSupp 64 (D Conn 1994) dealt with a situation where the persons attempting to substitute for the original class representative were not members of the class described by the original representative because they did not deal with the same defendant. This contrasts with the situation here, where it is uncontested that the substitute representative was an *unnamed member* of the original class. At least one court has concluded that reading In Re Colonial Ltd P'Ship Litig, "as a generalized rejection of American Pipe in the standing context" is inappropriate and inconsistent with superior authority. California Pub. Employees Ret. Sys. v. Chubb Corp., 2002 US Dist LEXIS 27189 (DNJ 2002), citing Haas, supra.

Bank West's description of Hess v. IRE Real Estate Income Fund, Ltd., 255 Ill App 3d 790; 629 NE2d 520, 533-534 (Ill Ct App 1993) will not stand up to a reading of the actual opinion either. Hess actually recognized the broad tolling effect of Crown Cork & Seal and American Pipe, creating for Illinois a particular and quite narrow exception that applies only "where the lack of standing ... was apparent in the face of the complaint." Hess at 533. Under these circumstances," the Hess court reasoned, "it

was not reasonable for the absent plaintiffs to rely on the class action suit to protect their rights." Id. Neither the facts nor rationale of Hess is even remotely applicable to the case at bar. Not only did the complaint state a claim, but that claim was found to be meritorious and was certified by the circuit court.[7]

Bank West's citation to Cunningham v. Insurance Co. of North America, 515 PA 486; 530 A2d 407 (Pa 1987) is improvident for the very same reason: the Court took pains to point out the narrow exception it crafted applied only "where the lack of standing of the representative plaintiff [in a previous dismissed suit] was plainly discernible on the face of the pleadings." Cunningham at 411. No such circumstance existed here.

Finally, Weston v. AmeriBank, 1999 US Dist LEXIS 20287 (WD Mich 1999) dealt not with intervention of a substitute class representative in a certified class suit, but a parallel suit filed after the initial suit was dismissed, alleging a claim that was never pleaded in the original suit. The Sixth Circuit's affirmance was based specifically on these grounds, Weston v. AmeriBank, 265 F3d 366, 369 (6th Cir 2001). The scenario here is different: the substitute representative assumes the **original claim** of the **original representative** in the **original suit**. This is precisely the fact scenario in those cases where substitution has been held to be not only appropriate, but required. Haas, *supra*, Dameron, *supra*, Alessandro, *supra*, Birmingham Steel, *supra*, McKowan Lowe, *supra*.

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[7] Both Bank West and the dissenting opinion improperly focus on the question of whether the class should have been certified with Cowles as the class representative. This analysis misses the issue framed and resolved by Crown Cork & Seal and American Pipe. The issue is not whether the class was properly certified but rather whether *unnamed class members* are entitled to rely upon a pending motion to certify or certified class without forfeiting claims they hold. *See* Crown Cork & Seal and American Pipe.

i. The Real Parade of Horribles: Non-Representative Litigation of Class Claims Through Mass Intervention by Class Members

Both Appellant and the Court of Appeals dissent attempt to trumpet a "parade of horribles" consisting of never-expiring class claims propounded by inventive class counsel wielding a hydra of creative legal theories.[8] Note that these concerns are *precisely* the concerns of the *concurring* opinion of Justice Powell in Crown Cork & Seal v. Parker, 462 US 345, 354-355 (1983), and the *concurring* opinion of Justice Blackmun in American Pipe & Construction Co. v. Utah, 414 US 538, 561-62 (1974). Both concurring opinions, however, endorsed fully the result in both cases: unanimous agreement that the claims of absent class members should be tolled during the pendency of class claims. Why? Because the "parade of horribles" that would result if the rule were otherwise is far more palpable and real: mass requests for joinder and intervention by the very class members who should be encouraged to rely upon the class action mechanism.

This point is ably made in the majority opinion in American Pipe:

> A federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions. Under the circumstances of this case, where the District Court found that the named plaintiffs asserted claims that were 'typical of the claims or defenses of the class' and would 'fairly and adequately protect the interests of the class,' Rule 23(a)(3), (4), the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue. Thus, the

8 It is worth noting that Congress recently created the Class Action Fairness Act ("CAFA"). CAFA is a sweeping reform of the class action vehicle, affecting claims jurisdictionally, substantively and procedurally. Yet, Congress made absolutely no changes to existing class action tolling rules under the federal scheme after which our own MCR 3.502 is patterned.

> commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs. **To hold to the contrary would frustrate the principal function of a class suit, because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties-precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases where a class action is found 'superior to other available methods for the fair and efficient adjudication of the controversy.' Rule 23(b)(3).**
>
> We think no different a standard should apply to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed) and thus cannot claim that they refrained from bringing timely motions for individual intervention or joinder because of a belief that their interests would be represented in the class suit. Rule 23 is not designed to afford class action representation only to those who are active participants in or even aware of the proceedings in the suit prior to the order that the suit shall or shall not proceed as a class action. **During the pendency of the District Court's determination in this regard, which is to be made 'as soon as practicable after the commencement of an action,' potential class members are mere passive beneficiaries of the action brought in their behalf. Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case.**

American Pipe at 550-551. *See also,* Crown Cork & Seal at 351-52.

Indeed, the rule Bank West would have this Court endorse would frustrate totally a class member's reliance upon the class action vehicle: here, the original class representative Cowles asserted the very Truth in Lending Act claim Paxson held. If Bank West's proposal is endorsed, absent class members such as Paxson must not only act to ensure the class representative is asserting all claims she holds, but also that there are no special defenses (such as limitations) to the class representative's claim, lest such a flaw in the class representative's claim destroy the claims of class members despite the

fact they do not have the same flaw. This makes no sense, and there is not a shred of caselaw, state or federal, supporting such a result. Indeed, were the Court to walk away from existing and settled tolling rules on a prospective basis the existing procedural rules would need to be overhauled to avoid due process problems. Class members, instead of being advised in a class notice that they need do nothing to participate in a class (as the Cowles class members were advised), would need to be advised that, despite the certification of a class, they must nonetheless intervene and assert **all** of their own claims on an individual basis or risk losing them due to any possible infirmity in the representative's claim. However, precisely because of due process implications such a drastic change cannot be made retrospectively by judicial fiat.

CONCLUSION

The Court of Appeals has done nothing more than apply well-settled rules of law to undisputed fact. Bank West's Application overreaches, making claims which are contradicted by the fact record and citing case authority that does not support the principles for which it is cited. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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